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Google LLC

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ANIBAL RODRIGUEZ, et al. individually and
on behalf of all others similarly situated,

Plaintiff,

v.

GOOGLE LLC,

Defendant.

Case No. 3:20-CV-04688-RS

**DEFENDANT GOOGLE LLC'S MOTION IN
LIMINE NO. 9 TO EXCLUDE EVIDENCE AND
ARGUMENTS RELATING TO PLAINTIFFS'
EMOTIONAL DISTRESS**

Date: July 30, 2025
Time: 09:30 A.M.
Court: Courtroom 3, 17th Floor, SF
Judge: Hon. Richard Seeborg

Date Action Filed: July 14, 2025
Trial Date: August 18, 2025

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE THAT on July 30, 2025, at 09:30 A.M., before the Honorable Richard Seeborg of the United States District Court for the Northern District of California in Courtroom 3 of the United States District Court for the Northern District of California, San Francisco Courthouse, 450 Golden Gate Avenue, San Francisco, CA 94102, Defendant Google LLC (“Google”) will move the Court to exclude testimony and argument relating to Plaintiffs’ alleged emotional distress damages.

This Motion is based on this Notice of Motion, accompanying Memorandum of Points and Authorities, the Omnibus Declaration of Eduardo E. Santacana in Support of Google LLC’s Motions in Limine Nos. 1-12 (“Santacana Decl.”) filed concurrently therewith, and exhibits attached thereto, and all other evidence in the record.

ISSUE PRESENTED

Whether any evidence and argument regarding Plaintiffs’ alleged emotional distress harm should be excluded pursuant to Rule 403 of the Federal Rules of Evidence.

Dated: June 24, 2025

COOLEY LLP

By: /s/ Eduardo E. Santacana

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Defendant Google LLC respectfully moves in limine to preclude Plaintiffs from introducing any evidence and argument regarding Plaintiffs’ alleged emotional distress damages for three reasons. *First*, Plaintiffs previously confirmed that they are not pursuing a class-wide emotional distress damages model. Since then, no party has proffered a class-wide damages expert or any other evidence to quantify emotional distress harm for the class, and the deadline for doing so has passed. To introduce any such evidence at this stage of the case—711 days since the close of expert discovery and 55 days from trial—would be prejudicial to Google and would confuse the issues and mislead the jury once trial begins. Fed. R. Evid. 403. *Second*, this Court did not certify any model that measures class-wide emotional distress harm. Allowing individualized testimony or argument concerning emotional distress at the class trial would risk jury confusion and undue prejudice by inviting the jury to render a verdict based on individualized issues. Such testimony should be excluded per Federal Rule of Evidence 403. *Third*, hearing testimony and argument on the issue of emotional distress would waste time. *Id.* One of the primary purposes of class certification is to achieve judicial economy by focusing the factfinder on common issues, and Plaintiffs’ presentation of individualized evidence of emotional harm would directly undermine that goal and may lead to decertification, which would delay adjudication of the merits of this case even further.

II. ARGUMENT

Plaintiffs chose not to proffer a class-wide emotional distress model and their deadline to do so has passed. In an effort to secure class certification of a damages class by the Court’s 2023 deadline, Plaintiffs submitted damages models to calculate disgorgement and economic damages. To date, Plaintiffs have submitted three damages expert reports in this matter. None offer a methodology or model for pursuing class-wide emotional distress damages. *See, e.g.*, ECF No. 364-23 (Expert Report of Michael J. Lasinski). In fact, in their Reply in Support of their Motion to Certify a Class, Plaintiffs renounced the need for a methodology to calculate emotional distress

1 damages in this case, stating: “Google faults Plaintiffs for . . . failing to offer a *fifth* method of
 2 calculating monetary relief, based on emotional distress. The law does not require plaintiffs to
 3 offer methodologies for every theoretical measure of relief.” ECF No. 333 (Plaintiffs’ Class Cert.
 4 Reply) at 9–10 (citation omitted). However, a party’s liability theory must match their damages
 5 model in order to establish that damages are capable of measurement on a class-wide basis. *See*
 6 ECF No. 352 (Class Cert. Order) at 13 (citing *Comcast Corp. v. Behrend*, 569 U.S. 27, 34, 35
 7 (2013) for the proposition that “A showing of predominance may fail if ‘questions of individual
 8 damage calculations will inevitably overwhelm questions common to the class.’ Damage
 9 calculations need not be exact, but ‘at the class-certification stage (as at trial), any model supporting
 10 a ‘plaintiff’s damages case must be consistent with its liability case.’” (citation omitted)); *see also*
 11 *Philips v. Ford Motor Co.*, No. 14-CV-02989-LHK, 2016 WL 7428810, at *23 (N.D. Cal. Dec. 22,
 12 2016) (denying motion to certify a class where the court would be forced to conduct individual
 13 inquiries and finding that “Plaintiffs’ damages model is inconsistent with their theory of liability
 14 and thus Plaintiffs ‘cannot possibly establish that damages are susceptible of measurement across
 15 the entire class for purposes of Rule 23(b)(3)’” (citation omitted)), *aff’d*, 726 F. App’x 608 (9th
 16 Cir. 2018). Plaintiffs in this case have not proffered any damages model to support their emotional
 17 distress damages claims, meaning that evidence and argument regarding Plaintiffs’ alleged
 18 emotional distress offered at this stage would require the Court to perform individualized inquiries.
 19 Any such inquiries would be inappropriate and prejudicial to Google, which would be forced to
 20 prepare lines of questioning and argument based on these individualized issues at this late stage
 21 and on a limited record, and/or move to decertify the class on the eve of or after a class trial.

22 Importantly, even with the exclusion of this prejudicial evidence, Plaintiffs would be
 23 permitted to present testimony required to meet their burden of proof under the law. Specifically,
 24 that they had a “reasonable expectation of privacy” and that Google’s conduct was “highly
 25 offensive.” ECF No. 352 (Class Cert Order) at 8 (providing elements of intrusion upon seclusion
 26 and invasion of privacy). In attempts to meet their burden, Plaintiffs may testify as to the
 27 circumstances surrounding the alleged intrusion and the context that led them to an expectation of
 28

1 what Google would do with their data without going into individualized inquiries about their
 2 alleged harm or distress. Plaintiffs' testimony need not veer into improper, individualized
 3 expressions of alleged harm or distress.

4 **This Court has not certified any model that measures class-wide emotional distress**
 5 **harm, and doing so now would prejudice Google.** In its Order Denying Google's Motion for
 6 Summary Judgment, this Court observed that while emotional distress could potentially support a
 7 claim for nominal damages on an individual basis, Plaintiffs had offered no class-wide model for
 8 such harm. ECF No. 445 at 17. In fact, during the Summary Judgment hearing, Plaintiffs' counsel
 9 conceded that there was no such model and that Plaintiffs could not seek emotional distress
 10 damages on a class-wide basis, stating: "I think the emotional distress, other than nominal damages,
 11 which I think we would be entitled to get, I don't think we could do that on a class-wide basis."
 12 Omnibus Declaration of Eduardo E. Santacana in Support of Google LLC's Motions in Limine
 13 Nos. 1-12 ("Santacana Decl."), Ex. M (July 25, 2024 Mot. for Summary Judgment Hr'g Tr.) at
 14 46:1-4. The deadline for discovery in this case has long passed. It is now too late for Plaintiffs to
 15 introduce a class-wide model, and to permit them to offer individualized testimony or argument
 16 concerning emotional distress at the class trial would confuse the jury, who, as Plaintiffs have
 17 pointed out in prior briefing, would likely be receiving jury instructions that ask them to "assume
 18 that the evidence at this trial *applies to all class members*." ECF No. 473 (Plaintiffs' Motion to
 19 Exclude in Part Google's Experts Hoffman, Black, and Knittel) at 13 (stating that "[t]he jury
 20 instructions should include information about class actions, such as CACI 115, which provides:
 21 'You may assume that the evidence at this trial *applies to all class members*.'" (emphasis in
 22 original)).

23 Furthermore, to allow Plaintiffs to introduce evidence which the jurors would have to
 24 entertain on an individualized basis would unduly prejudice Google, which has litigated this case
 25 as a class action for years and tailored its defense strategy to accommodate this Court's view that
 26 Plaintiffs could demonstrate class-wide harm. With trial scheduled to occur in just 55 days, Google
 27 has exchanged proposed trial stipulations and evidence with Plaintiffs with plans to defend this
 28

1 case as a class action. Enlarging the case at this late stage would invoke “precisely the kind of
 2 surprise that would unfairly prejudice litigants.” *See* ECF No. 281 (Order Denying Plaintiffs’
 3 Leave to Amend their Complaint to Add a Third Class) at 7.

4 Finally, Plaintiffs have not, and could not if they tried, meet their burden under Federal Rule
 5 of Civil Procedure 37(c)(1) to show that a belatedly disclosed expert opinion would be
 6 “substantially justified” or “harmless.” Fed. R. Civ. P. 37(c)(1) (“If a party fails to provide
 7 information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use
 8 that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the
 9 failure was substantially justified or is harmless.”). Discovery closed over 700 days ago, the parties
 10 are less than two months away from trial, and Plaintiffs have disclaimed on at least two occasions
 11 the need for a class-wide damages model for emotional harm. *See* ECF No. 333 (Plaintiffs’ Class
 12 Cert. Reply) at 16 and Santacana Decl., Ex. M (July 25, 2024 Mot. for Summary Judgment Hr’g
 13 Tr.) at 46:1–4. Allowing Plaintiffs to offer testimony and argument regarding Plaintiffs’ emotional
 14 distress harms, which are inherently individualized, or any belated damages model trying to
 15 measure that distress at this stage, would be unjustified and harmful to Google.

16 **Examining evidence of individual harm in a class trial would waste time.** Finally,
 17 introducing individualized evidence regarding Plaintiffs’ emotional distress would waste time
 18 because it would require Google to focus its questioning and argument on individualized issues
 19 rather than the common issues that predominate the class. This would result in numerous mini-
 20 trials as Google refutes each individual Plaintiff’s allegations of harm. One of the primary purposes
 21 of a class action is to “accomplish judicial economy by avoiding multiple suits,” and this directly
 22 undermines that goal. *See Cole v. CRST, Inc.*, 317 F.R.D. 141, 143 (C.D. Cal. 2016) (decertifying
 23 class where no common policy was found and individualized inquiries were required to find
 24 liability); *Pierce v. Cnty. of Orange*, 526 F.3d 1190, 1200 (9th Cir. 2008) (affirming district court’s
 25 decertification where it found issues of damages proof would be highly individualized).

1 **III. CONCLUSION**

2 For the foregoing reasons, the Court should exclude any evidence or argument regarding
3 Plaintiffs' alleged emotional distress harm.

4 Dated: June 24, 2025

COOLEY LLP

6 By: /s/ Eduardo E. Santacana

7 Benedict Y. Hur

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**[PROPOSED] ORDER GRANTING
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[PROPOSED] ORDER

Before the Court is Defendant Google LLC's ("Google") Motion in Limine No. 9 to exclude evidence and arguments relating to Plaintiffs' emotional distress damages.

Having considered the Notice of Motion and Motion in Limine, the incorporated Memorandum of Points and Authorities, the Omnibus Declaration of Eduardo E. Santacana in Support of Google LLC's Motions in Limine Nos. 1-12 filed concurrently therewith, and the exhibits attached thereto, along with other materials in the record, argument of counsel, and such other matters as the Court may consider, the Court GRANTS Google's Motion.

Accordingly, IT IS HEREBY ORDERED THAT:

Testimony and argument relating to Plaintiffs' alleged emotional distress damages will be excluded from trial in the above-captioned matter.

IT IS SO ORDERED.

DATED: _____

Honorable Richard Seeborg
United States District Judge